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August 7, 2002

Mr. Corbin Davis
Clerk of the Court
Michigan Supreme Court
525 W. Ottawa, 2nd Floor
G. Mennen Williams Building
P.O. Box 30052
Lansing, MI 48909

RECEIVED

AUG 09 2002

OFFICE OF
THE CHIEF JUSTICE

Re: File 1999-10
Proposed Amendment of MRE 703

Dear Mr. Davis:

I enclose comments of the State Bar Civil Procedure Committee on the proposed amendment to MRE 703.

Sincerely,

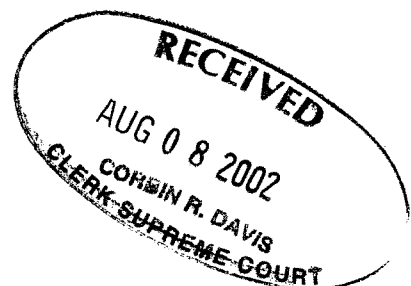


Richard Bisio
Chair, Civil Procedure Committee

RDB:axh

cc: Janet Welch, General Counsel of State Bar

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STATE BAR OF MICHIGAN
CIVIL PROCEDURE COMMITTEE

Recommendation on Proposed Amendment to MRE 703

Recommendation

The Civil Procedure Committee recommends against the proposed amendments to MRE 703 published by the Supreme Court on March 28, 2002. As an alternative, the committee recommends that the Court adopt the 2000 amendment to FRE 703, which highlights a trial court's authority and discretion to deal with inadmissible facts or data that support an expert opinion. The committee recommends the following amendment to MRE 703:

Rule 703 Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Reasons for Recommendation

Both proposed alternatives that the Court published for comment would require that the facts supporting an expert opinion be in evidence. The committee opposes that requirement. This is consistent with the State Bar's previous opposition to an earlier version of this proposal, which the committee supported. Consistent with the minority statements of Professor Reed and Judge Tahvonen in the August 7, 2000 report of the Advisory Committee on the Rules of Evidence, the Civil Procedure Committee continues to believe that the amendment is unnecessary because the rule presently provides the court with discretion to require that underlying facts or data be in evidence. That discretion is sufficient to meet the problems that the Evidence Committee's majority cites. The amendment is also unwise because it would unnecessarily require that underlying medical, business, or public records be in evidence even when there is no prejudice from an expert's reference to them. Alternative B, which would provide a means for admitting opinions when inadmissible or unadmitted facts cannot be contested in good faith, does not adequately deal with this problem because it would permit the opinion without disclosing the underlying facts to the jury, precluding them from evaluating the basis of the opinion.

The current rule adequately addresses the potential problem of disclosure of inadmissible facts to the jury by giving the court discretion to "require that underlying facts or data essential to an opinion or inference be in evidence." If the trial court decides not to require that the underlying facts be in evidence, the proposed additional provision (the 2000 amendment to FRE 703) provides further guidance. It emphasizes the court's discretion in permitting disclosure of inadmissible facts, requiring that the court expressly determine that the probative value of such facts outweighs their prejudicial effect. Taken together, these provisions provide ample discretion for a trial court to determine what is most appropriate in a particular case. The court can (1) require underlying facts to be in evidence and (2) when it does not do so, make a decision as to whether the jury should hear inadmissible facts, based on balancing their probative value and prejudicial effect. The committee believes that these provisions together adequately address the perceived problems with expert opinions relying on inadmissible or unadmitted facts.

5/6/02

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